

**PD-1289-17**  
In the Court of Criminal Appeals of Texas  
At Austin

FILED  
COURT OF CRIMINAL APPEALS  
4/10/2019  
DEANA WILLIAMSON, CLERK

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**No. 01-15-00717-CR**  
In the Court of Appeals  
For the First District of Texas  
At Houston

◆

**No. 1452040**  
In the 248<sup>th</sup> District Court  
Of Harris County, Texas

◆

**Dedric D'shawn Jones**  
*Appellant*

*v.*

**The State of Texas**  
*Appellee*

◆

**State's Motion for Rehearing**

◆

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### **Grounds for Rehearing**

1. This Court should not significantly reword the law of cross-examination in a case in which any error was harmless.
2. The Court's opinion did not consider Rule 403, the trial court's basis for excluding the cross-examination. Considering that this Court held the excluded evidence was so marginal its exclusion was harmless beyond a reasonable doubt, Rule 403 seems applicable here.

**This Court should not significantly rework the law of cross-examination in a case in which any error was harmless.**

On original submission this Court made two holdings. In the first, a bare majority<sup>1</sup> held that the trial court erred in limiting the appellant's cross-examination. In the second, a slightly different bare majority held that this error was harmless.

The Court's first holding significantly reworks the law of cross examination. It stands by the requirement of *Irby v. State*, 327 S.W.3d 138 (Tex. Crim. App. 2010) that the proponent of cross-examination must establish a "logical relationship" or "causal connection" between the proposed cross-examination and the witness's supposed bias. The Court then says, however, that this "principle cannot be applied too rigorously." *Slip Op.* at 10.

The practical effect of stating that a "principle cannot be applied too rigorously" is that it will not be applied at all. Trial judges, knowing that any error will be reviewed under the constitutional harm standard if they are too restrictive toward speculative cross-examination, but there will be no consequence if they are too lenient, will respond

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<sup>1</sup> To get five votes to make the first holding binding precedent, this Court counted the vote of a judge who dissented to the overall resolution of the case. This Court is at liberty to set its own rules of precedent, but as best the State can tell this is the first instance of this practice by this Court.

rationality let in any speculative cross-examination, less an appellate court accuse them of applying the legal standard “too rigorously.”

As it will play out in the trial courts, this is a major reworking of the law of cross-examination. But this holding benefits the appellant not at all, because in its second holding this Court holds the error was harmless.

At least one member the Court has suggested that when “the alleged constitutional violation [is found] to be harmless ... the conclusion that there was a constitutional violation was *dictum*.” *Kou v. State*, \_\_\_ S.W.3d \_\_\_, No. PD-1022-17, 2018 WL 2710953, at \*2 (Tex. Crim. App. June 6, 2018) (Keller, P.J., concurring to denial of discretionary review).

Making constitutional holdings when the error is harmless beyond a reasonable doubt risks allowing bad facts to make bad law. The facts here are certainly bad for making law—the Court acknowledges that the appellant’s offer of proof “was perhaps less than ideally thorough,” and then it later holds that the proffered cross-examination “would only marginally have increased the damage already inflicted upon her general credibility by other evidence...” *Slip Op.* at 11, 15.

Respectfully, a marginally preserved complaint of harmless error is not a jurisprudentially sound basis for a bare majority to rework the law of cross-examination. The State asks this Court to withdraw its first holding and instead assume, without deciding, that the trial court erred.

**The Court's opinion did not consider Rule 403, the trial court's basis for excluding the cross-examination. Considering that this Court held the excluded evidence was so marginal its exclusion was harmless beyond a reasonable doubt, Rule 403 seems applicable here.**

The trial court excluded cross-examination about the CPS proceedings because it believed the proceedings “are not relevant to this trial and in fact would be more prejudice to the defendant.” (4 RR 13). This Court's opinion, in holding that the trial court abused its discretion, addressed only relevance. It did not address the Rule 403 holding implicit in the trial court's ruling.

In light of this Court's holding that excluding the evidence was harmless beyond a reasonable doubt, the trial court's Rule 403 determination seems on point. This Court did not hold the exclusion was harmless because the State's evidence was overwhelming; it held the exclusion was harmless because the probative value of the excluded evidence was minimal:

[A]ny cross-examination to expose Gonzales's potential bias *would only marginally have increased* the damage already inflicted upon her general credibility by other evidence .... And, what is more, the jury would have perceived a potential for bias on Gonzales's part inherent in the simple fact that she was both the victim's mother and the child's grandmother. That Gonzales had an interest in assuring that Appellant did not retain custody of the child *would only have added incrementally* to the jury's perception of her as an interested witness of questionable reliability.

*Slip Op.* at 15 (emphasis added). This sounds like the sort of analysis that would be performed in the context of a Rule 403 ruling.

Aside from its relevance determination, the trial court found the fact of the CPS proceedings would prejudice the defendant, and indeed they would have. Parental termination proceedings are not an ordinary result of a criminal prosecution for an offense not against the child. Informing the jury of CPS proceedings would have informed the jury that there were other allegations about the appellant's behavior as it relates to his parenting. Was he an accused pedophile? Was he an accused child abuser? Was he an accused deadbeat? The record does not show the basis for the termination proceedings, and defense counsel wanted to discuss them only in the context of Gonzales's bias. The jury would have likely been left to speculate as to what bad thing the appellant had done to his child.

By not addressing the trial court's Rule 403 ruling, but then holding that the error was harmless because excluding the evidence was harmless beyond a reasonable doubt, this Court creates the impression that Rule 403 does not have an application to cross-examination. This is not correct. *See, e.g., Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009); *Delaware v. Van Arsdale*, 475 U.S. 637, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.").

When evidence is so marginally-probative that its exclusion is harmless beyond a reasonable doubt, and the evidence would have introduced inflammatory accusations against the defendant, that evidence should be excluded under Rule 403. This Court should grant rehearing and address the trial court's Rule 403 ruling.

## **Conclusion**

The State asks this Court to grant rehearing and either withdraw its constitutional holding regarding cross-examination, or reevaluate that holding in light of Rule 403.

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